

# JUDGES' BENCHBOOK OF THE BLACK LUNG BENEFITS ACT

---



PREPARED BY THE U.S. DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, DC

AUGUST 2001

---

## CHAPTER 18 Overpayment, Waiver, and Recovery

### *Chapter 18*

<b>Overpayment, Waiver, and Recovery</b>	<a href="#"><u>18.1</u></a>
I. "Overpayment" defined	<a href="#"><u>18.1</u></a>
II. Jurisdiction	<a href="#"><u>18.2</u></a>
A. Federal Claims Collection Act	<a href="#"><u>18.2</u></a>
B. Six year statute of limitations inapplicable	<a href="#"><u>18.2</u></a>
III. Waiver of recovery of overpayment	<a href="#"><u>18.2</u></a>
A. Entitlement to a hearing	<a href="#"><u>18.3</u></a>
B. "Without fault" defined	<a href="#"><u>18.3</u></a>
1. Honest mistake	<a href="#"><u>18.3</u></a>
2. Erroneous information	<a href="#"><u>18.4</u></a>
a. Prior to applicability of December 20, 2000 regulations	<a href="#"><u>18.4</u></a>
b. After applicability of December 20, 2000 regulations	<a href="#"><u>18.5</u></a>
C. "Defeat the purpose of title IV of the Act" defined	<a href="#"><u>18.6</u></a>
D. "Against equity and good conscience" defined	<a href="#"><u>18.6</u></a>
V. Amount of the overpayment	<a href="#"><u>18.7</u></a>
V. Recovery of the overpayment	<a href="#"><u>18.8</u></a>
A. Entitlement to a hearing	<a href="#"><u>18.8</u></a>
B. Repayment amount and schedule	<a href="#"><u>18.8</u></a>
C. Offset of a state benefit award	<a href="#"><u>18.10</u></a>
1. The "up-front" method; attorney fees	<a href="#"><u>18.11</u></a>
2. Survivors' benefits	<a href="#"><u>18.11</u></a>
D. The Federal Employees Compensation Act	<a href="#"><u>18.11</u></a>

## ***Chapter 18***

### **Overpayment, Waiver, and Recovery**

---

#### **I. “Overpayment” defined** [ III(C)(2)(e) ]

The provisions at 20 C.F.R. § 725.522(c)<sup>1</sup> state that if benefit payments are commenced prior to the final adjudication of the claim and it is later determined by an administrative law judge, the Benefits Review Board (“Board”), or a court of appeals that the claimant was ineligible to receive such payments, such payments shall be considered overpayments pursuant to § 725.540 and may be recovered in accordance with the provisions of Part 725. The regulations at § 725.540(a) provide the following additional means by which an overpayment may be created:

a) General. As used in this subpart, the term “overpayment” includes:

- (1) Payment where no amount is payable under this part;
- (2) Payment in excess of the amount payable under this part;
- (3) A payment under this part which has not been reduced by the amounts required by the Act (see § 725.533);
- (4) A payment under this part made to a resident of a State whose residents are not entitled to benefits (see §§ 725.402 and 725.403);
- (5) Payment resulting from a failure to terminate benefits to an individual no longer entitled thereto;
- (6) Duplicate benefits paid to a claimant on account of concurrent eligibility under this part and Part 410 or 727 of this title or as provided in § 725.309.

20 C.F.R. § 725.540(a). Further, the amended regulations make clear that “[n]o operator or carrier may recover, or make an adjustment of, an overpayment without prior application to, and approval by, the Office which shall exercise full supervisory authority over the recovery of or adjustment of all overpayments.” 20 C.F.R. § 725.547(b) (Dec. 20, 2000).

---

<sup>1</sup> See 20 C.F.R. § 725.522(b) (Dec. 20, 2000).

## **II. Jurisdiction**

### **A. Federal Claims Collection Act<sup>2</sup>**

In *Jones v. Director, OWCP*, 14 B.L.R. 1-80 (1990), the Board held that the administrative law judge and the Board had subject matter jurisdiction over the issue of waiver and recovery of overpayment. 33 U.S.C. § 921(b); 20 C.F.R. §§ 725.450 and 725.481. The Board stated that the Federal Claims Collection Act's (FCCA) \$20,000 ceiling on agency discretion with respect to the compromise and collection of claims does not affect the jurisdiction of the Office of Administrative Law Judges or Board to determine whether overpayments should be waived. The provisions of the FCCA, as amended by the Debt Collection Act of 1982, are not triggered until a collectible claim or debt to the government is found to exist. An overpayment does not become a claim or debt within the meaning of the Debt Collection Act until a determination that it will not be waived has been made. The FCCA's \$20,000 limitation does not come into effect until the waiver process is complete; thus, it does not affect the administrative law judge's or the Board's jurisdiction in waiver determinations. *See also Potisek v. Director, OWCP*, 14 B.L.R. 1-87 (1990).

### **B. Six year statute of limitations inapplicable**

A claim for recovery of an overpayment pursued by the Director is not time-barred by the six-year statute of limitations. In *Nelson v. Director, OWCP*, 21 B.L.R. 1-5 (1997), Claimant argued that a 1993 overpayment claim filed by the DOL was untimely pursuant to the six year statute of limitations contained at 28 U.S.C. § 2415(a) where the DOL had “enough information in 1979 to seek recovery.” The Board held, however, that the DOL's action to recover an overpayment “is not an action for money damages within the meaning of § 2415(a)” such that the claim was not time-barred.

## **III. Waiver of recovery of overpayment**

Overpayments may be waived under certain circumstances.<sup>3</sup> The regulations provide that there shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual: (a) who is without fault; *and* where (b) adjustment or recovery would either: (1) defeat the purpose of title IV of the Act, or (2) be against equity and good conscience. 20 C.F.R. § 725.542.<sup>4</sup>

---

<sup>2</sup> Reference to the FCCA at § 725.544(a) has been deleted under the amended regulations and replaced by citation to 31 U.S.C. § 3711. Also, the amended regulations provide that the agency's claims for the recovery of an overpayment may not exceed \$100,000, exclusive of interest.

<sup>3</sup> It is important to note that, prior to applicability of the December 20, 2000 regulations, the waiver provisions at 20 C.F.R. §§ 725.541-725.544 are *inapplicable* where the overpayment was made by an employer or insurance carrier. 20 C.F.R. § 725.547. The amended regulations provide, however, that the foregoing waiver provisions *are applicable* to overpayments made by responsible operators. 20 C.F.R. § 725.547(a) (Dec. 20, 2000).

<sup>4</sup> It is noteworthy that the Board has concluded that the provisions at § 725.544, which address the claimant's ability to pay the overpayment amount, are inapplicable to the issue of waiver which “pertains to the separate issue of collection and compromise of claims.” *Ashe v. Director, OWCP*, 16 B.L.R. 1-1-109 (1992).

Also, the provisions at 20 C.F.R. § 410.561h require waiver of adjustment or recovery of an overpayment under §§ 410.561e(a), (b), and (c), and 410.561f. Pursuant to § 725.543, the standards for determining the applicability of the criteria of § 725.542 shall be the same as those applied by the Social Security Administration under §§ 410.561-410.561h.

#### **A. Entitlement to a hearing**

If a claimant seeks waiver of the recovery of an overpayment which was paid by the Trust Fund, he or she is entitled to request and receive a hearing prior to the Director, OWCP being authorized to commence recoupment of the amount paid. *See Jones, supra; Potisek, supra.* However, in *Justus v. Knox Creek Coal Co.*, 16 B.L.R. 1-95 (1992), the Board held that, where an overpayment is made by an employer/carrier, “the administrative law judge properly found that the hearing requested by claimant was not within his jurisdiction and could serve no purpose.” *But see* footnote 26, *supra* (the waiver provisions apply to overpayments made by the responsible operator under the amended regulations).

In *Nelson v. Director, OWCP*, 21 B.L.R. 1-5 (1997), the Board reiterated that “prior to the recovery of an overpayment, a (claimant) has a right to an oral hearing on the issues of fault and whether recovery would defeat the purpose of the Act or be against equity and good conscience.” Because no hearing had been held with regard to these issues, the claim was remanded.

#### **B. “Without fault” defined**

If the finder of fact concludes that claimant is at fault, there is no need to consider whether recovery would be against equity and good conscience or defeat the purpose of the Act, as waiver would be prohibited. 20 C.F.R. §§ 725.542 and 410.561a(a)(b)(2). *See also Hampton v. Director, OWCP*, 11 B.L.R. 1-118 (1988) (the Board affirmed an administrative law judge's finding that claimant was at fault when she remarried and failed to inform the DOL even though uncontradicted testimony established that employees at the Social Security Administration said that her remarriage would not affect her eligibility for benefits).

##### **1. Honest mistake**

A finding of “without fault” does not necessarily involve a finding of no bad faith or misrepresentation on claimant's part, as “fault” can be the result of an honest mistake. *Barone v. Bowen*, 869 F.2d 49 (2d Cir. 1989); *Morgan v. Finch*, 423 F.2d 551 (6th Cir. 1970). Further, the Board held that actions of the government are not relevant in determining whether claimant is “without fault” under 20 C.F.R. § 410.561(b). *Valente v. Secretary of Health & Human Services*, 733 F.2d 1037 (2d Cir. 1984); *Morgan, supra*; *Jones v. Director, OWCP*, 14 B.L.R. 1-80 (1990).

## **2. Erroneous information**

### **a. Prior to applicability of December 20, 2000 regulations**

Under § 410.561h, an adjustment or recovery of an overpayment will be waived if a claimant relies on “erroneous information” as described in § 410.561f. If the claimant relies on erroneous information, he or she will be without fault and will not have to undergo further analysis under § 410.561a. However, where a claimant is initially found entitled to benefits, receives interim benefits, and then the claim is finally denied, such initial determination of entitlement does not constitute “erroneous information.” *Potisek v. Director, OWCP*, 14 B.L.R. 1-87 (1990) (the Board held that claimant did not rely on “erroneous information” under 20 C.F.R. § 410.561(f) where Department of Labor failed to advise claimant of possibility that she would have to repay interim benefits if claim was ultimately denied; § 410.561(f) contemplates situation where agency official provides misinformation, not a failure to provide information). *See also Bracher v. Director, OWCP*, 14 F.3d 1157 (7th Cir. 1994); *McConnell v. Director, OWCP*, 993 F.2d 1454, 1458 (10th Cir. 1993); *Napier v. Director, OWCP*, 999 F.2d 1032, 1035 (6th Cir. 1993). Also, the Board held that a stipulation that the claimant is “without fault” in the creation of the overpayment under 20 C.F.R. § 410.461(b) is not a concession that the claimant is without fault by relying on “erroneous information” within the meaning of 20 C.F.R. § 410.561f. *Freedline v. Director, OWCP*, BRB No. 89-0329 BLA (Sept. 20, 1991)(unpub.).

Moreover, in *Weiss v. Director, OWCP*, 16 B.L.R. 1-56 (1990), the Board held that an initial determination of entitlement is not the sort of “erroneous information” to which § 410.561f is referring. The Board noted that § 410.561f refers to erroneous information “with respect to the interpretation of a pertinent provision of the Act or regulations,” not a factual finding regarding claimant's entitlement to benefits under the Act. *See generally Potisek, supra; McConnell v. Director, OWCP*, 993 F.2d 1454 (10th Cir. 1993).

In *Bracher v. Director, OWCP*, 14 F.3d 1157 (7th Cir. 1994), the Seventh Circuit agreed with the Tenth Circuit's holding in *McConnell v. Director, OWCP*, 993 F.2d 1454, 1458 (10th Cir. 1993) that the district director's initial award of benefits does not constitute the type of “erroneous information” contemplated in the Act in determining whether to waive an overpayment. In this vein, the *Bracher* court held that interim black lung payments to a miner, who is ultimately found to not be entitled to benefits, are recoverable under the overpayment and recoupment provisions of the Act. *See also Benedict v. Director, OWCP*, 29 F.3d 1140 (7th Cir. 1994).

It is further noted that, in *Napier v. Director, OWCP*, 999 F.2d 1032 (6th Cir. 1993), the Sixth Circuit disagreed and remanded an overpayment claim to permit the widow to offer an autopsy report indicating that the miner died due to pneumoconiosis. The court determined that it would be inequitable “to require his estate to disgorge the money” if the record supports entitlement to benefits.

**b. After applicability of December 20, 2000 regulations**

Under certain circumstances, the amended regulations provide that an overpayment shall not be subject to collection where the claimant is without fault. The language at § 725.310(d) reads as follows:

An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing the amount of benefits payable based on a finding of a mistake in a determination of fact may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is decreased, no payment made in excess of the decreased rate prior to the date upon which the party requested reconsideration under paragraph (a) of this section shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which is decreased following the initiation of modification by the district director, no payment made in excess of the decreased rate prior to the date upon which the district director initiated modification proceedings under paragraph (a) shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which has become final and is thereafter terminated, no payment made prior to the date upon which the party requested reconsideration under paragraph (a) shall be subject to collection or offset under subpart H of this part. In the case of an award which has become final and is thereafter terminated following the initiation of modification by the district director, no payment made prior to the date upon which the district director initiated modification proceedings under paragraph (a) shall be subject to collection or offset under subpart H of this part.

20 C.F.R. § 725.310(d) (Dec. 20, 2000). In its comments, the Department noted that subsection (d) was revised “with the stated purpose of prohibiting the recovery, by either the Trust Fund or a responsible operator, of benefits paid pursuant to a final award of benefits that is later modified.” Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,975 (Dec. 20, 2000). The Department also made it clear that the district director must initiate the modification proceeding in order to preclude collection of any payments made pursuant to the prior final award. Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,975 (Dec. 20, 2000).

It is further noted that the amended regulations provide that the waiver provisions at §§ 725.541-725.544 are applicable to overpayments made by responsible operators as well as the by the Director, OWCP. 20 C.F.R. § 725.547(a) (Dec. 20, 2000). In its comments, the Department stated the following:

The Department concluded that the opportunity to obtain a waiver or adjustment of a debt should be made available to all claimants regardless of their benefits' source.

...

The Department also rejected the position that waiver of an overpayment owed an operator amounted to the unconstitutional deprivation of property, citing caselaw upholding overpayment recoveries under the more restrictive Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 914(j), 922, as incorporated by 30 U.S.C. § 932(a).

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 80,016 (Dec. 20, 2000).

### **C. “Defeat the purpose of title IV of the Act” defined**

The provisions at § 410.561c state that the phrase “defeat the purpose of title IV” means to “deprive a person of income required for ordinary and necessary living expenses.” In *Keiffer v. Director, OWCP*, 18 B.L.R. 1-35 (1993), the Board held that the overpayment regulation does not “provide for consideration of prospective expenses;” rather, “the administrative law judge’s decision and order must be based on the evidence of [current income and] current expenses in the record before him, 20 C.F.R. § 725.477(b), not on what could happen in the future.” Thus, the fact that the miner’s wife will someday need full-time nursing care cannot be considered. However, the Board noted that the claimant may seek modification at any time based upon a change in financial circumstances. See also *Rosimos v. Director, OWCP*, BRB No. 89-2527 BLA (April 30, 1991)(unpub.) (the claimant’s age, and unexpected medical costs relating to the claimant’s health are not properly considered); *McConnell v. Director, OWCP*, 993 F.2d 1454 (10th Cir. 1993) (income of a claimant’s wife could be considered in determining whether recovery of overpayment would defeat the purposes of the Act, despite contention that the income was the wife’s property, but expenses paid by the claimant’s wife in support of her 43 year old daughter and other children could not be considered in absence of evidence that the claimant and his wife were legally responsible for such support).

In *Gordon v. Director, OWCP*, 14 B.L.R. 1-60 (1990), the Board held that “installment payments” under § 410.561c(a)(1), as incorporated into Department of Labor regulations at 20 C.F.R. § 725.543, include department store credit card accounts and are thus, “ordinary and necessary expenses.” The Board further held that the different subsections under § 410.561a are separate categories and must be considered independently of each other.

The Board has held that the payments need not be for someone for whom the claimant is legally responsible. As an example, gifts to claimant’s granddaughter were “ordinary and necessary expenses.” But see *McConnell*, supra; *Smith v. Director, OWCP*, BRB No. 89-3561 BLA (February 26, 1991) (unpub.) (the Board cited *Gordon* but upheld administrative law judge’s finding that annual expenses for gifts, landscaping, and restaurant meals “perhaps went beyond those costs which are considered as ordinary and necessary expenses under the Act”).

### **D. “Against equity and good conscience” defined**

Section 410.561d states that it is “against equity and good conscience” when a claimant relinquishes a valuable right or changes his or her position for the worse based on notice that a payment would be made or by reason of an incorrect payment. A claimant must demonstrate that

the money was spent in such a manner that would not have occurred but for receipt of the overpayment. *McConnell v. Director, OWCP*, 993 F.2d 1454 (10th Cir. 1994) (money spent on extended vacation could not be recovered). Section 410.561d specifically states that the claimant's financial circumstances are irrelevant in determining whether recovery would be against equity and good conscience. See *Hervol v. Director, OWCP*, 16 B.L.R. 1-53 (1990). In *Strickland v. Director, OWCP*, BRB No. 89-2963 BLA (Sept. 24, 1991) (unpub.), the Board held that recovery of an overpayment is not against equity and good conscience where the claimant, expecting to receive benefits, resigns from employment six years prior to the award of interim benefits. The Board concluded that claimant did not relinquish a valuable right or change his position for the worse in reliance on an overpayment pursuant to § 410.561d since he resigned prior to a determination that he was entitled to benefits. See also *Smith v. Director, OWCP*, BRB No. 89-3561 BLA (Feb. 26, 1991)(unpub.)(the Board held that overpayment should not be waived on the basis of detrimental reliance where the claimant purchased items like a camper vehicle and the evidence failed to establish that the “claimant would not have been able to undertake those financial obligations without the income from the benefits”).

In *Benedict v. Director, OWCP*, 29 F.3d 1140 (7th Cir. 1994), the court held that lump sum recovery of an overpayment was not against equity and good conscience as:

Benedict admits that he neither relinquished a valuable right nor changed his position for the worse because of the overpayment. Instead he argues that recovery of the overpayment would simply be unfair because it would force him and his wife to relinquish a large portion of their savings accumulated over the course of their lives. While we are not unsympathetic to Benedict's position, we also recognize that Benedict's receipt of the interim benefits enabled him, at a minimum, to maintain his high level of savings. Had Benedict not received the interim benefits, he may well have spent whatever savings he accumulated in precisely the same way that he spent the interim benefits, thus reducing his life savings by a corresponding amount.

## **V. Amount of the overpayment**

In calculating the amount of the overpayment, § 725.535(d) provides an exclusion for legal, medical, or related expenses incurred in connection with a state or federal claim for benefits for disability or death due to pneumoconiosis. In *Pickens v. Director, OWCP*, 19 B.L.R. 1-116 (1995), the claimant was found liable for an overpayment of Black Lung benefits because he received a concurrent state award for permanent total disability, 15% of which was due to pneumoconiosis. The claimant paid \$7,600 in attorney's fees in order to obtain the state award.

The Board held that in determining the extent to which the overpayment should be reduced in light of the legal expenses incurred in connection with the state award as required by 20 C.F.R. § 725.535(d), the burden is on the claimant to establish the amount of legal expenses which are related to obtaining that portion of the state award attributable to pneumoconiosis. Mere submission of payment receipts, without any indication that the time charged was spent obtaining the pneumoconiosis portion of the state award is insufficient. The Board concluded that, in the absence of more specific evidence supplied by a claimant, the percentage of the state award due to pneumoconiosis is an acceptable form of “other evidence” under § 725.535(d) in determining the



portion of attorney's fees to be excluded from the amount of the overpayment.

Depending upon how the fees or expenses are apportioned, the regulatory exclusion can provide a significant reduction in the amount of the overpayment for which the claimant is liable. In *Cadle v. Director, OWCP*, 19 B.L.R. 1-56 (1994), the Board set forth the method for apportioning legal fees and medical expenses incurred in connection with the state claim where the attorney's fees and costs are awarded by the state in a lump sum without any mandate for their disbursement. First, if the state award is in a lump sum, it is broken down into monthly payments. Then, the monthly state award is credited toward the claimant's legal fees and expenses thereby delaying the reduction of claimant's federal monthly benefits on account of his concurrent state award until he has received an amount of state benefits equal to the attorney's fees and costs. *See also Director, OWCP v. Barnes and Tucker Co.*, 969 F.2d 1524 (3d Cir. 1992).

To illustrate: Assume a claimant is awarded a lump sum of \$24,000 in state benefits for disability due to pneumoconiosis covering a period of two years for which he also received federal black lung benefits of \$500 per month, and that \$10,000 of the state award was paid to the claimant's attorney for legal fees and expenses. Initially, the overpayment of federal benefits is calculated to be \$12,000; after excluding the claimant's legal fees and expenses, the overpayment is reduced by \$5,000 (\$500 x 10 months) to reflect the ten months of state benefits required to pay the legal fees and expenses incurred in obtaining the state award.

Please note that in *Cadle*, the Board overruled *Scuilli v. Bethlehem Mines Corp.*, 8 B.L.R. 1-206 (1985) to the extent it is inconsistent with *Cadle*. In *Scuilli*, the Board held that attorney's fees and expenses should be spread evenly over the life of a benefit award on a monthly basis and then subtracted on a monthly basis from the state monthly benefit; the net state benefit amount is then used to determine the offset. Since most state benefit awards are more generous than federal awards, the effect of this *pro rata* method would eliminate any exclusion for attorney's fees and expenses from the amount of the overpayment.

## **V. Recovery of the overpayment**

### **A. Entitlement to a hearing**

Citing to *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Board held that, in cases where the *waiver of recovery* of overpayment is *not* an issue, the district director may begin recoupment prior to a hearing and decision concerning the amount of the overpayment. *Burnette v. Director, OWCP*, 14 B.L.R. 1-152 (1990).

### **B. Repayment amount and schedule**

If it is determined that the overpayment cannot be waived (in the case of a responsible operator under the pre-December 2000 regulations) or will not be waived (in the case of the Director, OWCP or responsible operator under the amended December 2000 regulations), then there are two issues presented regarding the overpayment: (1) the actual overpayment amount that the claimant received, and (2) the amount that may be recovered by the Director, OWCP or employer.

The Board has issued conflicting rulings regarding whether the administrative law judge must establish a repayment schedule for those overpayments which will not be waived. In *Tamborini v. Director, OWCP*, BRB No. 90-0845 BLA (October 4, 1991) (unpub.), the Board remanded an overpayment case stating that the administrative law judge failed to provide a rationale in support of a repayment schedule of \$150.00 a month given that the claimant had \$115,703.63 in securities and mutual funds. The Board concluded that the administrative law judge “must determine whether the claimant is capable of making immediate restitution of the full overpayment amount.” *See also Ashe v. Director, OWCP*, 16 B.L.R. 1-109 (1992) (the Board also held that it is within the administrative law judge's discretion to consider assets of the claimant's spouse in determining the repayment amount and schedule); *McConnell, supra*.

In *Keiffer v. Director, OWCP*, 18 B.L.R. 1-35 (1993), the Board held that the administrative law judge must consider the “financial circumstances of the entire household, including the combined income and expenses of both claimant and spouse as well as jointly and separately owned assets in determining claimant's ability to repay and (the amount of) overpayment.” The Board further held that the administrative law judge should “discuss the impact of depletion of an income-producing asset on claimant's future monthly income relative to his monthly expenses as well as how claimant's other assets would enhance is repayment ability. In the event that the claimant's financial circumstances change, the Board noted that he or she may seek modification:

[T]he purpose of the formal hearing is to establish the existence of the debt, not how it will be paid. (citations omitted). The administrative law judge's inquiry is merely whether claimant is in a financial position to assume repayment of the debt created by the overpayment. Once the debt is established as owing, and collection efforts begin...claimant has the right to seek modification if his financial circumstances change, *see* 4 C.F.R. § 104.2(b); 20 C.F.R. § 725.310.

*Id.* After issuance of *Keiffer*, the Board issued an unpublished decision in *Jennings v. Director, OWCP*, BRB No. 97-1537 BLA (May 27, 1998) and upheld an administrative law judge's finding that, because Claimant's monthly income exceeded his monthly expenses, “recovery of the overpayment would not deprive claimant of funds needed to meet ordinary and necessary living expenses.” The Board further affirmed the administrative law judge's conclusion that Claimant was entitled to a partial waiver of the overpayment amount upon finding that Claimant had “changed his position for the worse and relinquished a valuable right by both paying . . . toward his daughter's college tuition and by paying . . . for house repairs.” However, the Board then held that an administrative law judge does not have the authority to determine a repayment schedule in a case involving a claim for repayment of overpayment. Rather, the administrative law judge is limited to determining the amount of the overpayment and whether the overpayment should be partially or totally waived. The Board cited to its decision in *Keiffer v. Director, OWCP* 18 B.L.R. 1-35 (1993) and concluded that “[t]he purpose of the formal hearing is to establish the existence of debt, not how it will be repaid.”

However, in the unpublished decision of *Collins v. Director, OWCP*, BRB No. 98-0371 BLA (Nov. 27, 1998)(unpub.), the Board did not follow *Keiffer* and stated the following:

The administrative law judge has simply accepted claimant's assertion of an ability

to repay \$50.00 per month; but, especially in light of claimant's \$450.00 monthly surplus, the administrative law judge has failed to indicate why the \$50.00 per month repayment amount is any more viable than the \$100.00 figure arrived at by the district director or any other figure. Inasmuch as the administrative law judge has failed to explain how he has arrived at the \$50.00 figure, we hold that his determination violates the Administrative Procedure Act . . .

. . .

Accordingly, on remand the administrative law judge must fully explain his basis for arriving at the \$50.00 figure or, in the alternative, must craft another repayment plan.

This holding appears to run contrary to the Board's holding in *Keiffer* wherein it concluded that the purpose of the formal hearing is to establish the existence of a debt, "not how it will be paid." Indeed, in *Keiffer*, the Board stated that "[t]he administrative law judge's inquiry is merely whether claimant is in a financial position to assume repayment of the debt created by the overpayment."

### **C. Offset of a state benefit award**

Often, an overpayment to the claimant will stem from the fact that he or she is receiving benefits both from a state award as well as a federal award. The regulations provide that federal benefits be offset by any state benefits which are awarded to the claimant. 30 U.S.C. § 932(g); 20 C.F.R. § 725.535. *See O'Brockta v. Eastern Assoc. Coal Co.*, 18 B.L.R. 1-71 (1994), *aff'd*, 54 F.3d 141 (3d Cir. 1995). Section 725.535(b), providing that only concurrent state awards may offset federal awards, precludes offset of a prior state award against subsequent federal black lung benefits as the state award covers benefits for a period ending before a claimant becomes entitled to federal benefits. *Harmon Mining Co. v. Director, OWCP*, 826 F.2d 1388 (4th Cir. 1987).

In *Lucas v. Director, OWCP*, 14 B.L.R. 1-112 (1990), the Board determined that, where the State of West Virginia found that 15% of the claimant's disability was due to pneumoconiosis, then only 15% of the state award was attributable to the disease for the purposes of determining the amount of overpayment and offset. *See Burnette, supra*.

In *Director, OWCP v. Hamm*, 113 F.3d 23 (4th Cir. 1997), the court noted that offset provisions under the Act are "designed to supplement, but not duplicate, state benefits for pneumoconiosis." As a result, it concluded that the Board's determination that Claimant's "federal benefits . . . be offset by only 20 percent of his total state benefits because only 20 percent of those benefits could be attributable to pneumoconiosis," was in error. In this vein, the Fourth Circuit stated the following:

Hamm receives lifetime benefits from West Virginia for total disability. Prior to obtaining his total disability award, Hamm received a number of permanent partial disability (PPD) awards from the state. In 1974, 1977, and 1988, he obtained PPD awards of 15, 15, and 20 percent respectively for pneumoconiosis. His second and third awards were based on increases in his total impairment due to pneumoconiosis to 30 percent and finally 50 percent.

Consequently, the court determined that the aggregate prior awards resulted in a State determination “that Hamm suffers 50 percent permanent disability on account of pneumoconiosis” such that his federal benefits “should be offset by 50 percent of the amount of his second injury award.”

### **1. The “up-front” method; attorney fees**

In *Director, OWCP v. Barnes & Tucker Co.*, 969 F.2d 1524 (3d Cir. 1992), the Third Circuit upheld the Director's interpretation of the method of offset under 20 C.F.R. § 725.535. The Court reasoned that the Director, as the policymaker under the Black Lung Benefits Act, was entitled to deference as long as his or her interpretation is neither unreasonable nor inconsistent with the regulations. The Court then proceeded to uphold the Director's determination of the amount of offset through using the “up-front method” which assumes that the claimant will use as much of his or her initial benefit payments as is necessary to pay attorney fees; thus, federal benefits are not offset until the claimant's state attorney's fees are paid.

### **2. Survivors' benefits**

In *Carbon Fuel Co. v. Director, OWCP*, 20 F.3d 120 (4th Cir. 1994), the Court held that § 932(g) of the Act requires an offset of state workers' compensation benefits which are conditioned upon “death *or* disability due to pneumoconiosis” such that the “survivor's federal black lung benefits must be offset by a state workers' compensation award where both awards depended upon a showing that the decedent had been totally disabled due to pneumoconiosis, although pneumoconiosis was not the cause of death.”

## **D. The Federal Employees Compensation Act**

In *Sammons v. Wolf Creek Collieries*, 19 B.L.R. 1-24 (1994), the Board held that, in the event benefits are awarded, an employer was not entitled to offset for Federal Employee Compensation Act (FECA) benefits received by a claimant-federal mine inspector, which totaled \$ 1,500.00 a month, because the miner's FECA award was for his accidental death and not for total disability due to pneumoconiosis.

In *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4<sup>th</sup> Cir. 1999), the court held that Claimant, who worked as a federal employee, was not required to “seek recourse against the federal government under FECA before seeking recourse against a private employer under the Black Lung Benefits Act.” The court reiterated that “if an individual were entitled to benefits both from his private employer under the Black Lung Benefits Act and from the federal government under FECA, the FECA benefits would offset the amount owed by the private employer.” The court concluded that the miner was “free” to choose to pursue benefits under both FECA and the Black Lung Benefits Act or to “seek compensation first, or even exclusively, under the more generous (black lung) statutory scheme.”